Office Supreme Court U.S.
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MAR 9 1901
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c/c. 192.

Sy. of Dodd, No. [illegible]

For Appellees.

Supreme Court of the United States.

OCTOBER TERM, 1900.

Filed Mar. 9, 1901. 192.

THE GERMAN NATIONAL BANK, ADOLPH REUTLINGER AND ALBERT REUTLINGER, *Appellants*,

v.

A. J. SPECKERT, JACOB FRANKEL, HARRIET FRANKEL, ET AL., - - - - *Appellees.*

BRIEF FOR APPELLEES.

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SUPREME COURT OF THE UNITED STATES.

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BRIEF FOR APPELLEES.

STATEMENT.

This is an appeal from a decree of the Circuit Court of Appeals for the Sixth Circuit, entered December 4, 1899, reversing a decree of the Circuit Court of the United States for the District of Kentucky, with directions to it to remand the case to the state court "from whence it was removed." (Pr. Rec. 70-76.)

The suit was commenced by the appellees April 4, 1894, in the Jefferson Circuit Court of Kentucky against the appellants as defendants. It was a suit in behalf of the creditors and stockholders of the Louisville Deposit Bank, in which it was alleged that the appellants and

one Moses Schwartz had entered into a conspiracy to induce the complainants to subscribe and pay for stock in the Louisville Deposit Bank, and then to misappropriate the proceeds of said stock to the payment of the obligations of the said Moses Schwartz to appellants.

It is alleged that in March, 1891, the said Moses Schwartz was indebted to the appellant, German National Bank, in divers sums aggregating over two hundred thousand dollars, and was hopelessly insolvent, and was also at the same time indebted to the appellants, Adolph and Albert Reutlinger, the president and assistant cashier of the said German National Bank; that the said appellants had discovered the utter insolvency of the said Schwartz and realized that unless they could devise a scheme that would enable them to unload their worthless claims against said Schwartz on others, they would be unable to realize anything on the said claims; that after conference they agreed to acquire and did acquire a state charter for the Louisville Deposit Bank, with an authorized capital stock of three hundred thousand dollars, and then set about to organize and float that bank with Moses Schwartz as its president; that they thereupon issued prospectus and subscription papers, wherein they fraudulently represented that the said Schwartz was worth as much as the authorized capital stock of the said proposed new bank, over and above his indebtedness, and was a very successful and capable business person, suitable in all respects to be the president of the said bank; and they headed the list of subscriptions with large bogus amounts, aggregating at least sixty thousand dollars, not one cent of which was ever in fact paid by them, nor in-

tended at the time to be paid by them, otherwise than by a transfer thereof to the said Moses Schwartz after the completion of the organization of the said Deposit Bank and the inauguration of the said Schwartz as president thereof.

It was further alleged that they then approached the appellees and, by their false and fraudulent representations (as set forth in detail in their complaint), induced the appellees to subscribe and pay for stock in the said bank at its par value. They then commenced and systematically proceeded to unload on the said Louisville Deposit Bank their worthless claims against the said Schwartz, including their bogus subscriptions aforesaid, and within about two years, secured from the said bank, and applied in execution of their fraudulent scheme, every available dollar it possessed. In this wrecked and looted condition the said Louisville Deposit Bank was forced to the wall and compelled to make a general assignment for the benefit of its creditors to a trust company which was managed and controlled by the appellants.

After first having exhausted their efforts to have the assignee bring this suit, the appellees instituted it as stockholders and creditors of the said wrecked bank and sought to make the conspirators in the perpetration of the said fraud trustees *ex maleficio* of the funds of the said Deposit Bank derived from their spoliation of its capital, and to compel them to account for and make restitution thereof.

On January 14, 1895, the appellants filed lengthy separate answers. (Pr. Rec. 14-28).

On May 6, 1895, the appellees filed replies to the said answers, joining issue on each and every affirmative allegation therein contained. (Pr. Rec. 30-31.)

Voluminous proofs were taken and the cause was fully prepared for trial in the state court. (See stipulation Pr. Rec. 64.) The taking of the proofs in the case was closed by both sides in the spring of 1897, and the case was regularly set down for final hearing on its merits and stood for trial on the trial calendar of the state court on June 28, 1897.

In January, 1897, the appellant, German National Bank, was put into the hands of a receiver by order of the Comptroller of the Currency. When the case was called for final trial on its merits, on June 28, 1897, the said R. H. Courtney, as such receiver, appeared as an intervenor, and petitioned to be made a party, to which application the appellees objected. The said brief petition is in words as follows:

> "R. H. Courtney, receiver of the German National Bank, would respectfully represent unto the court that since the filing of this suit and since the filing of the last pleading herein, the German National Bank has become insolvent, and that under due and regular proceedings had in conformity with the laws of the United States, and especially in conformity with that statute commonly known as the National Bank Act, the Comptroller of the Currency has assumed charge of all the assets of the said German National Bank, and has appointed your petitioner, the said R. H. Courtney, as receiver of the said German National Bank, and of all its assets, and that he is now such receiver thereof, duly appointed and qualified, and that your petitioner, the said R. H. Courtney, receiver, desires to contest the claim of the plaintiffs

herein, and does now assert that the said claim is not a just one against the said German National Bank, and that no judgment should be rendered against it thereunder.

"Wherefore, the said petitioner, R. H. Courtney, now asks the court to require the plaintiffs to make him a party defendant herein, and upon being made such party defendant, asks to be allowed to conduct the defense herein, the said German National Bank, now being in his hands as aforesaid, and its directors having no power or authority over its assets and being, therefore, *without means to conduct the defense herein;* and your petitioner will ever pray." (Pr. Rec. 39-40.) (The italics are ours.)

The state court allowed the said petition to be filed, and immediately thereafter the said Courtney filed his petition to remove the cause to the Federal court, and moved the state court to grant such removal. The said petition for removal is in words as follows:

"Your petitioner, R. H. Courtney, receiver of the German National Bank, would respectfully represent unto the court that he has been appointed by the Comptroller of the Currency, and now is, receiver of the defendant, the German National Bank, and the said appointment was made by the said Comptroller under the laws of the United States, and especially under that law commonly called the National Bank Act; that the suit herein is one arising under the constitution and laws of the United States; that it involves largely more than $5,000. Your petitioner now presents herein this petition, and also a bond duly executed according to law, and asks that this petition be filed, said bond accepted, and that this court will proceed no further herein; and your petitioner will ever pray." (Pr. Rec. 40.)

The state court granted the said motion, to which ruling the appellees excepted.

On October 4, 1897, upon the filing of the transcript on the removal, the appellees moved to remand the case to the state court, which motion was in words as follows:

> "Come the plaintiffs and cross-plaintiffs herein and moved the court to remand this case to the state court because the facts disclosed on the face of the transcript show that it is not a removable case under the statute, and that the motion to remove to this court was made too late.
>
> "Wherefore, for these reasons and other reasons manifest on the face of the record, this cause should be remanded to the state court." (Pr. Rec. 1.)

On February 8, 1898, the court overruled this motion. Thereafter, an amended and reformed bill of complaint was filed, which was demurred to by the appellants. On October 3, 1898, the demurrer was sustained, and shortly thereafter, the appellees declining to plead further, the bill as amended was dismissed and an appeal allowed and prosecuted by the appellees to the Circuit Court of Appeals for the Sixth Circuit. (Pr. Rec. 65-68.)

The case was argued and submitted in the said Circuit Court of Appeals on October 4, 1899. On December 4, 1899, a decree was rendered by the said Circuit Court of Appeals reversing the said cause with directions to remand the same to the state court "from whence it was removed." (Pr. Rec. 70.)

A very lucid, strong and ably written opinion was delivered by the said court, which said opinion is in words and figures as follows:

No. 676.

United States Circuit Court of Appeals,

SIXTH CIRCUIT.

A. J. SPECKERT, ET AL., *Appellants*,
v.
GERMAN NATIONAL BANK, ET AL., *Appellees*.

Appeal from the United States Circuit Court for the District of Kentucky.

SUBMITTED OCT. 4, 1899.
DECIDED DEC. 4, 1899.

Before TAFT, LURTON and DAY, Circuit Judges.

Day, Circuit Judge, delivered the opinion of the court:

"On April 2, 1894, the appellants commenced this action in the Jefferson Circuit Court of Kentucky against The German National Bank and others. The bill alleged that the defendants had entered into a conspiracy to induce the complainants to subscribe to stock in the Louisville Deposit Bank, and, to that end, had made certain false and fraudulent representations in reference thereto. The Deposit Bank had become involved and its assets had been diverted, as was alleged, to pay certain debts of one Moses Schwartz, who was charged as a coconspira-

tor with the German National Bank. On January 14, 1895, the answer of the German National Bank was filed. Proofs were taken and the cause prepared for trial. In January, 1897, the German National Bank was put into the hands of a receiver, by order of the Comptroller of the Currency. On June 28, 1897, the receiver filed an application to be made a party to this suit in the state court, which application was granted, and the receiver was duly made a party to the action. Thereupon, the receiver filed a petition to remove the cause from the state court to the United States Circuit Court for the District of Kentucky. The state court made an order granting the petition and accepting the bond. October 4, 1897, on the filing of the transcript in the Circuit Court of the United States for the District of Kentucky, plaintiffs moved to remand the case to the state court. On February 8, 1898, the court overruled this motion. Thereafter an amended bill of complaint was filed, which was demurred to by the German National Bank and the receiver. On October 3, 1898, the demurrer was sustained, and upon the 15th of the same month, plaintiffs having declined to plead further, the bill was dismissed.

"Upon the appeal two questions are presented: Should the Circuit Court of the United States have maintained jurisdiction of the case? Second, should the demurrer to the bill, as reformed, have been sustained? We find it necessary to consider only the first of these questions. An elaborate and able argument has been made by counsel for appellees as to the rights of receivers of national banks to prosecute original actions in the Federal courts, and to remove cases commenced against them from the state to the Federal courts. We do not think it necessary to enter upon a consideration of the rights of receivers of national banks in such actions, and the only question presented of record which we deem it necessary to decide is whether a receiver, under the circumstances shown in this case, having been admitted as a party in the proceedings in the state court, has any right to remove the case. By the act of July 12, 1882

(22 Statutes, 162, chapter 290), cutting down the Federal jurisdiction in cases where national banks are parties, it was provided as follows:

"'That the jurisdiction for suits hereafter brought by or against any association established under any law providing for national banking associations, except suits between them and the United States, or its officers and agents, shall be the same as and not other than the jurisdiction for suits by or against banks not organized under any law of the United States, which do, or might do, banking business where such national banking associations may be doing business when such suits may be begun.'

"In Leather Manufacturers' Bank v. Cooper, 120 U. S. 779, it was held by the Supreme Court that the act of 1882 prohibited the acquiring of Federal jurisdiction by removal, as well as by original suit. See also Petri v. Commercial National Bank, 142 U. S. 644.

"Section 4 of the act of March 3, 1887, re-enacted August 13, 1888 (25 Statutes, 433; chapter 866), provides:

"'All national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal or mixed, and all suits in equity, be deemed citizens of the states in which they are respectively located; and in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between the individual citizens of the same state. The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank.'

"The effect of the act of 1882 was to place national banks, for the purpose of the jurisdiction of the courts of the United States, upon the same footing as other banking institutions in the state wherein they are located, and to prevent the removal of cases to the Federal courts by national banks because of

their organization as Federal corporations. National banks now have the same right to bring suit in the Federal court that any citizen has, and the jurisdiction of the Federal court is not enlarged in their favor, or right of removal granted to them in actions against them. It is conceded that the bank had no right to removal in this case. There is no diversity of citizenship or other grounds upon which removal could have been had by it. Had the receiver a better right of removal? In the case of The Bank of Bethel v. Bank of Pahquioque, 14 Wall. 384, it was held that a suit could be maintained by the creditor of a national bank in a state court, and that it might be prosecuted, after the failure of the bank, without making the receiver a party. In this case it is held that a creditor of a national bank may resort to a state court for an adjudication of his claim, and such adjudication is conclusive upon the receiver. In Denton v. Baker, 79 Fed. 189, it was held that while the receiver of an insolvent national bank may interpose in a suit to enforce a claim against the bank, he is not necessarily a party to the suit; that a judgment in such suit, to which he is not a party is binding upon the receiver in the absence of fraud or collusion. In National Bank of Commonwealth v. Mechanics' National Bank, 94 U. S. 437-440, it was held that claims against an insolvent bank, whose validity is established by a judgment in a court of competent jurisdiction, and claims that are proven to the satisfaction of the comptroller, stand upon the same footing. In that case a suit against the insolvent bank was sustained, although the receiver was not a party thereto. In National Bank v. Colby, 21 Wall. 609, it was held in a suit against a national bank where its property had been attached at the suit of an individual creditor that the receiver might intervene in order to discharge the attachment. In that case the corporation had been dissolved by decree of the District Court of the United States, and it was held that, in view of that fact, the suit against the bank had abated.

"We have, therefore, reached the conclusion in

the light of these authorities and the construction of the statutes applicable to this case by the Supreme Court of the United States, that the receiver, after his appointment, was a proper party to the action, and, being vested with the property of the bank and required to look after its interests with a view to the conservation and distribution of its assets was properly admitted by the state court to defend the action brought against it. While this is true, he was in no sense a necessary party, and the action would have been prosecuted without his presence, and the judgment rendered in the action would have been conclusive against him as well as the bank. The question upon which the case turns in our view is: Can a receiver, under the circumstances of this case, not being a necessary party to the action, but having been admitted to defend in the interest of his trust, remove the cause to the Federal court? In view of the decisions of the Supreme Court in analogous cases we are constrained to hold that he can not. We have not been cited to any cases exactly in point in the Supreme Court, but find adjudications establishing the proposition that one who comes voluntarily into an action is subject to the disabilities of the parties already in the case as to the right of removal. In Cable v. Ellis, 110 U. S. 389, it was held in a suit in equity involving title to real estate and priority of liens pending in a state court, where the highest court of the state had decided some of the points in controversy and had remanded the case to the court below to have other issues determined, and where one who became interested in the property by grant from one of the parties to the suit had intervened to protect his rights at a time when the right of removal had expired as to all parties, that the intervention of such party was to be regarded as incidental to the original suit and that he was subject to the disabilities resting on the party from whom he took title; and that the right of removal having expired before he intervened, his right of removal was also barred. In Houston & Texas Central Railway Co. et al. v. Shirley, 111 U. S. 358; Cable v. Ellis,

supra, was approved, and the court speaking through Mr. Chief Justice Waite, said: 'A substituted party comes into a suit subject to all the disabilities of him whose place he takes, so far as the right of removal is concerned.' See also Jefferson, trustee, v. Driver, administrator, et al., 117 U. S. 272. It is urged in the argument by counsel for appellees that these are cases where a person voluntarily comes into the suit after the right of removal has expired, and being substituted in the case, has no higher right than the original party to the suit. It is said that receivers of national banks have higher rights to stand upon than the bank itself. This may be true in some instances, yet in the present case we are not advised of any defense to the claim in question which the bank could not have made as well as the receiver. The receiver succeeds to the interest of the bank and his right to defend against this claim is no broader than that of the bank itself.

"It is also true that, under the Statutes of the United States as they now stand, the bank never had any right to the removal of the cause, and, therefore, the case is not precisely analogous to those cited, in which the Supreme Court has held that the right of removal having expired in favor of the original party, the substituted party comes into the case subject to the disabilities of him whose place he takes. But the receiver comes into an action duly prosecuted in the court of the state with all the necessary parties to a final and conclusive judgment. His presence is voluntary and not essential to a determination of the controversy. The conclusion that we reach is that the receiver, not coming into the cause as a necessary party, though properly admitted for the purpose of controlling the defense, the case involving property in which he was largely interested as a trustee, had no right of removal. The Federal Statutes giving a receiver the right to remove, apply to cases where the receiver is a necessary party to the action, whether the suit is commenced against him originally or otherwise. This decision is in harmony with a case admittedly in all respects like the one

under consideration, decided in the Circuit Court of Appeals for the Eighth Circuit, Wichita National Bank v. Smith, 72 Fed. 568. The judgment of the circuit court is reversed, and the cause remanded with directions to remand the same to the state court from whence it was removed, the receiver, out of the funds in his hands, to pay the costs in the circuit court and in this court." (Pr. Rec. 70-74.)

This opinion is reported in 98 Fed. Rep. 151, and 38 C. C. A. 682.

On January 9, 1900, an appeal was allowed from the said decree to this court, and the transcript was filed in this court January 29, 1900. (Pr. Rec. 74-76.)

The same two questions are presented in this court that were presented in the said Circuit Court of Appeals, to wit:

1. Should the Circuit Court of the United States for the District of Kentucky have maintained jurisdiction of the case notwithstanding the motions and objections of the appellees?

2. Should the demurrer of the appellants to the bill as reformed have been sustained?

ARGUMENT.

I.

THE CASE GENERALLY.

It will be seen that the Circuit Court of Appeals only considered and decided the first of the above questions, and, in view of its conclusion on that question, it was unnecessary for it to pass on the second question.

It should be further observed that neither at the date of the institution of this litigation, nor at any time thereafter, could any of the necessary parties thereto have successfully commenced the suit in, or removed it to, a Federal court; that the parties were all citizens of the same state, and the liability asserted depended on principles of general law alone, and the controversy was in no sense a separable one within the meaning of the law.

It must be further noted that the intervening petition of R. H. Courtney, receiver, to be made a party presented no new defense whatever, nor any kind of defense, except as a substitute to continue the defense that had already been filed by the German National Bank more than two years before its suspension; that neither of the other codefendants of the said bank, nor the said bank, joined or united with the said Courtney, receiver, in asking for the said removal. We claim that this failure to join in such application is as fatal to the validity of the removal on the ground that a Federal question is involved, as it would have been if the application had

been based on diversity of citizenship, and that the nature of the action and of the claim asserted at the time of the institution of the suit, and not the character of defense made thereto, constitute the true test to determine whether it arises under the laws of the United States.

We claim that the liability which is the subject matter of this action is one arising under the general law, and is not dependent either on the constitution or any law of the United States; that none of the parties impleaded as defendants to the suit ever had the right, either jointly or severally, to remove the controversy from the state to the Federal jurisdiction; that the tardy and voluntary intervention of R. H. Courtney, receiver, did not change the status of the jurisdiction as it then existed, nor amount to anything more than to allow him, as a substitute, to wear the shoes of the German National Bank in its defense against the cause of action asserted by appellees.

R. H. Courtney, receiver, was never a necessary party to the litigation, nor was he ever made a party thereto by appellees, but became a party by an order of court entered on his own motion and over the objections of appellees. (Pr. Rec. 39.) He voluntarily intervened in an action to which he was not a necessary party, and, after thus coming in as a volunteer and substitute, he is subject to all the disabilities of the German National Bank, the burden of whose continued defense he assumed, asserting in his said petition that it was "without means to further conduct its defense." The said bank never could at any time have removed the case from the state to the Federal court.

A concurrence by this court in these views, or in the opinion of the Circuit Court of Appeals for the Sixth Circuit, may dispense with the necessity of passing on the second question.

In case this court should not so concur, then we wish to submit some general observations on the second question.

In the discovery of frauds and in furnishing appropriate remedies to the parties defrauded, equity does not suffer technicalities to stand in its way, but seizes upon the substance of the case and holds all guilty parties liable to account, following trust property into the hands of remote grantees and persons who have taken it with notice of the trust impressed on it.

The funds diverted in this case did not technically belong to the creditors and stockholders, but to the Louisville Deposit Bank in trust, however, for their use and benefit. The latter and its assignee were technically the sufferers by the loss sustained, and the right to sue therefor was primarily vested in the said assignee.

It is true that the creditors and stockholders, as the cestuis que trust, suffer if the corporation as their legal trustee neglected or refused to sue, but they could not sue until they had first substantially complied with the provisions of equity rule 94 of this court.

If the corporation or its assignee had, in good faith, first sued for the redress of these grievances, then the shareholders could not have maintained either a joint or a separate action against the appellants therefor.

It is, however, made perfectly manifest in this case that, before instituting this action, the appellees com-

plied with all of the precedent conditions to have the suit brought by the assignee of the said Deposit Bank. (Pr. Rec. 55-56.)

It is made to appear that the said assignee was then under the complete domination and control of the German National Bank, having the same president and six out of a total of nine of the same directors, and that a demand was made upon it and refused.

Being thus under the control of the alleged conspirators, it could not reasonably be expected to sue, and the demand proved to be an idle ceremony. Hence, the beneficiaries, whose assets had thus been spoliated, brought this action in equity, because their rights were purely derivative and equitable.

They had the right to sue for themselves and all others entitled to participate in the spoliated assets, and their bill, as reformed and amended, was not multifarious. This court has substantially stated the rule on this point to be as follows:

> "There is not any positive and inflexible rule as to what, in the sense of a court of equity, constitutes multifariousness which is fatal to a suit on demurrer. * * * The different portions or shares into which the subject may be divisible amongst themselves must be considered. * * * Where they seek an account and the recovery of a subject claimed by their common title, or an equivalent for the subject, against parties charged with having, by fraudulent combination, withheld and diverted that subject, and by such combination and diversion rendered themselves equally, jointly and severally, liable therefor, the bill is not multifarious." Shields v. Thomas, 18 How. 260.

This rule seems to fit our case. The object of the appellees was to trace and secure restitution of a spoliated trust fund. They asked for the appointment of a receiver, and an accounting, to more effectually determine and harvest the fund, and then to have the same distributed amongst those entitled thereto, accordingly as they might be entitled to participate therein. As all of them claimed interests therein, first, as creditors, and next as stockholders, of course, the fund recovered should not be distributed without those interested being parties to the distribution.

It is next insisted that the matters complained of were *ultra vires*, the charter of the German National Bank. We think it has become a settled principle of this court that national banks are liable for the acts of their servants, while engaged in the business of their employment, in the same manner and to the same extent that individuals are liable under like circumstances.

Even as to confessedly *ultra vires* transactions, the rule has been stated by this court to be as follows:

> "The courts have always striven to do justice between the parties, so far as could be done consistently with law, by permitting property or money parted with on the faith of an unlawful contract to be recovered back, or compensation to be made for it."
>
> Transp. Company v. Pullman Company, 139 U. S. 60.
> Pullman Company v. Transp. Company, 171 U. S. 151.

The authorities accord with reason and justice, and conduce to show that national banks can not retain the proceeds of an unlawful act, and escape an accounting in equity and restitution on the plea that it was *ultra vires*.

II.

JURISDICTION.

We claim that the decree of the Circuit Court of Appeals should be affirmed, and wish to submit some propositions and authorities in support of this contention.

1. That in order to remove a cause from a state to a Federal court, on the ground that a federal question is involved, where the controversy is not a separable one, all the defendants must unite in the application for removal. In this case the receiver alone applied for the removal. He was not a party until nearly thirty-nine months after the commencement of the suit, and, then, only became a party by virtue of his voluntary and unnecessary intervention. Neither the German National Bank nor any of its alleged coconspirators, sued as codefendants with it, ever united with the said Courtney, as receiver, in any application for the removal of the case.

The recent case of Chicago, Rock Island & Pacific Railroad Co. v. Martin, 178 U. S. 245, appears to us to be decisive of this point. That was a suit filed January 26, 1894, by one Martin against the said railroad company, and the receivers of the Union Pacific Railway Company, in the District Court of Clay County, Kansas, to recover

for personal injuries, alleging that the said defendants, jointly, caused the death of plaintiff's intestate.

On February 14, 1894, the first named defendant filed its separate answer. On February 20, 1894, the receivers of the Union Pacific Railway Company filed their petition and bond, praying for a removal of the cause to the Federal court, on the ground that they derived their authority from, and were appointed receivers by, the decrees of the Circuit Court of the United States, for the Districts of Nebraska and Kansas, in which they were ordered to take charge of and operate the said Union Pacific Railway Company, and that while thus engaged in operating it, the injuries complained of occurred, and that, as to them, the suit was one arising under the laws of the United States. The District Court of Clay County, Kansas, denied their application, and, upon the trial, a verdict was rendered against all of the defendants, for $10,000. The cause was taken, on error, to the Supreme Court of Kansas, and the judgment was affirmed by that court. (59 Kans. 437.)

It was then, by writ of error, brought to this court, and the sole question considered was "whether it was necessary for the Chicago, Rock Island & Pacific Railroad Company, defendant, to join in the application of its co-defendants, the receivers, to effect a removal." After due consideration of the language of the statute, and after applying thereto the previous decisions of this court, the conclusion was reached, that, in the absence of a separable controversy, all of the defendants must join in the application for removal, whether it be predicated on a federal question, or on a diversity of citizenship.

The Supreme Court of Kansas, in passing on the question (59 Kans. 447), said:

> "Our own construction of the Federal Statute, on the subject, is that it was necessary for both defendants to join in the petition for a removal. They were charged with jointly causing the death of the plaintiff's intestate.
>
> "The controversy was not separable, and the receivers, alone, had no right to removal on the ground that a Federal question was involved. No Federal question was in fact presented by the pleadings, nor litigated at the trial. It was the ordinary action under our statute for wrongfully causing the death of the plaintiff's intestate."

It can be truthfully asserted that substantially the same state of case exists here.

This court, in affirming this conclusion of the Supreme Court of Kansas, among other things, said:

> "There was no separable controversy here. The case presented a joint cause of action against all the defendants, and the removal was applied for on the ground that the suit arose under the Constitution and laws of the United States. It, therefore, came within the first clause of the section quoted, and, if the same rule governs proceedings under that clause, that obtains in respect of the second clause, the judgment of the Supreme Court of Kansas must be affirmed. *And in view of the language of the statute, we think the proper conclusion is that all the defendants must join in the application under either clause.*" (Our italics.)

And again, further on in said opinion, this court said:

> "No Federal question was in fact presented by the pleadings nor litigated at the trial. The liability

depended on principles of general law applicable to the facts, and not in any way upon the terms of the order appointing the receivers. Whatever the rights of the receivers to remove the cause, if they had been sued alone, the controversy was not a separable controversy within the intent and meaning of the act. This being so, the case came solely within the first clause of the section, and we are of the opinion that it was not intended by Congress that, under such circumstances, there should be any difference between the rule applied under the first and second clauses of Section 2 of the Act of 1887-8."

This conclusion was anticipated and it logically followed the previous decisions of this court. See,

Hanrick v. Hanrick, 153 U. S. 192.
Torrence v. Shedd, 144 U. S. 527.
Whitcomb v. Smithson, 175 U. S. 635.
Water Co. v. Keyes, 96 U. S. 199.
Blackburn v. Mining Co., 175 U. S. 571.
Leather Mfg. Bank v. Cooper, 120 U. S. 779.
Petri v. Com. National Bank, 142 U. S. 644.
Bank of Bethel v. Bank of Pahquioque, 14 Wall. 384.

Since the rendition of the above opinion, it has been approved and followed in the following cases, among others:

Gableman v. Peoria Ry. Co., 101 Fed. Rep. 1, which has been affirmed by this court during the present term; 21 Sp. Ct. Rep. 171.
Yarnell v. Felton, 104 Fed. Rep. 161.

2. That since July 12, 1882, national banking associations have occupied the same federal jurisdictional status as state banks located in their respective domiciliary

states, and have possessed no other nor greater right of removal than that possessed, under similar circumstances, by such state banks. See,

22 U. S. Stat. 162, Chap. 290.
24 U. S. Stat. 552, Chap. 373.
25 U. S. Stat. 433, Chap. 866.
72 Fed. Rep. 568 (19 C. C. A. 42), Wichita National Bank v. Smith.
98 Fed. Rep. (38 C. C. A. 682), Speckert v. Ger. Nat. Bank.
164 U. S. 691, ex parte Jones.
142 Fed. Rep. 644, Petri v. Com. Nat. Bank.
134 U. S. 527, Whittemore v. National Bank.
132 U. S. 141, National Bank v. Morgan.
120 U. S. 778, Leather Nat. Bank v. Cooper.

3. That the appointment of a receiver by the comptroller, under Section 5234, U. S. Rev. Stat., pending litigation against such bank in the state court, does not arrest nor affect the competent jurisdiction of the state court to proceed with the case to judgment without the receiver being made a party, and that the judgment so rendered therein against the bank, in the absence of fraud or collusion, is such an adjudication of the liability as was contemplated by Section 5236 of the U. S. Rev. Stat., and is as conclusive, in the absence of the receiver as a party, as it would have been if he had been formally made a party upon his appointment. It would have been an adjudication by a court of competent jurisdiction within the meaning of Section 5236, supra. The jurisdiction of the state court, having once become fixed, could not be affected by the supervenient insolvency of the bank. In other words, the receiver is merely the statutory assignee

of the bank for the specific purposes named in the statute. The corporation is not dissolved by his appointment. The contracts and liabilities, existing at the time of his appointment, between the bank and others, continue to subsist, and a final judgment against the bank thereon, rendered by a state court of competent jurisdiction, would necessarily and conclusively establish the existence and extent of the liability, and be as binding on the receiver as on the bank.

14 Wall. 383, Bank of Bethel v. Pahquioque Bank.
79 Fed. Rep. 189 (24 C. C. A. 476), Denton v. Baker.
8 Wall. 506, Kenredy v. Gibson.
17 Wall. 19, Bank v. Kennedy.
21 Wall. 609, Bank v. Colby.
94 U. S. 440, National Bank v. Mechanic's National Bank.
173 U. S. 113, Bausman v. Dixon.
21 Sp. Ct. Rep. 109, Baggs v. Martin.

4. That the receiver, not being a necessary party, but coming voluntarily into a pending suit against the bank, becomes an agent or substitute for the bank, and as such comes into the suit subject to all of the disabilities of his principal, the bank, whose place he takes, so far as the right of removal is concerned.

110 U. S. 389, Cable v. Ellis.
111 U. S. 358, R. R. Co. v. Shirley.
117 U. S. 274, Jefferson v. Driver.
122 U. S. 535, Hedge Co. v. Fuller.
53 Fed. Rep. 162, Burnham v. Bank.
38 Fed. Rep. 213, Jarboe v. Templer.
59 Fed. Rep. 727, Ry. Co. v. Twitchall.
67 Fed. Rep. 4, Wagon Works v. Benedict.

5. That this is a suit against several persons jointly involved with the bank in an unlawful combination and conspiracy to defraud the complainants, and is not susceptible of division into separable controversies by the defendants. The cause of action is the subject matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiffs declared it to be in their pleadings. That a Federal question, in order to constitute a ground of removal, must affirmatively appear on the face of the plaintiff's complaint, and its absence can not be supplied by any statement in the subsequent pleadings or in the petition for removal. That the case had been pending in the state court several years, with all of the necessary parties to a final and conclusive judgment, before the receiver voluntarily intervened, and that the receiver, not being a necessary party to the action, could not divest the state court of jurisdiction by his voluntary and unnecessary intervention.

21 Supreme Court Rep. 67, C & O. Ry. Co. v. Dixon.
144 U. S. 527, Torrence v. Shedd.
175 U. S. 635, Whitcomb v. Smithson.
167 U. S. 57, Walker v. Collins.
165 U. S. 624, Wade v. Lawder.
155 U. S. 482, Postal Tel. Co. v. Alabama.
152 U. S. 454, Tennessee v. Bank of Commerce.
155 U. S. 102, Chappell v. Waterworth.
115 U. S. 41, Pirie v. Tvedt.
116 U. S. 408, Fletcher v. Hamlet.
117 U. S. 275, Sloane v. Anderson.
132 U. S. 599, L. & N. R. R. Co. v. Wangelin.
178 U. S. 245, Chicago, &c., R. R. Co. v. Martin.
169 U. S. 92, Powers v. C. & O. R. R. Co.
156 U. S. 335, Connell v. Smiley.

6. The question naturally suggests itself that, if by reason of the petition for removal, filed by Courtney, receiver, on June 28, 1897, the Circuit Court of the United States, for the District of Kentucky, acquired jurisdiction, then to what extent did that jurisdiction extend? Did it embrace the entire controversy and carry with it all of the necessary parties defendant, notwithstanding their failure to join in the petition and application for the removal? If not, then, how much of the controversy, and over what parties, did the state court still retain jurisdiction? Is it possible, under the Act of 1887-8, that any one whose presence as a party is not necessary to a final and conclusive adjudication of the controversy, can voluntarily intervene in a state court suit, at any stage thereof, and, without even tendering any defense, stop the entire machinery of the state court by removing the entire controversy to the Federal jurisdiction? We have, we think, heretofore shown that there was no separable controversy in this case, and that the cause of action is jointly against the German National Bank, Adolph Reutlinger, Albert Reutlinger and Moses Schwartz. Neither one of the said four named parties joined in the application of the said Courtney, receiver, for a removal. If there be a separable controversy, the suit is still pending in the state court against those whom the complainants seek judgment. We, therefore, have an anomalous case presented of an unnecessary and voluntary intervenor, by petition to be made a party, filed more than three years after the institution of the suit, and who upon being made a party by the court, over the objections and protests of complainants, moves the entire controversy from the state to the

federal judiciary. We respectfully sumbit that this can not be rightfully done. The only two states of case under the National Currency Act, of which the federal judiciary have exclusive jurisdiction, are provided for in Sections 5237 and 5239 of the U. S. Rev. Stat., and are as follows:

Firstly. Suits brought by the comptroller, in the nature of *quo warranto* against such bank to enforce a forfeiture of its franchise; and,

Secondly, suits brought by national banks against the comptroller to enjoin the receivership.

In all other cases the jurisdiction of the state courts is full and complete. Since July 12, 1882, the jurisdiction of the state courts has been exclusive of the Federal courts, where the parties are citizens of the same state, and where no Federal question was involved on the face of the complaint.

We, therefore, confidently submit that the decree of the Circuit Court of Appeals of the Sixth Circuit, appealed from herein was correct and should be affirmed.

III.

THE CIRCUIT COURT FOR THE DISTRICT OF KENTUCKY ERRED IN SUSTAINING THE DEMURRER TO THE BILL AS REFORMED AND AMENDED.

We scarcely deem it necessary, in view of our convictions on the jurisdictional question, to elaborate our views on the demurrer. We believe that this court will find it unnecessary to consider this question. If, how-

ever, this court should disagree with the Circuit Court of Appeals for the Sixth Circuit, then, and then only, will it become necessary to consider this branch of the case. We wish, however, to briefly submit the following points and authorities on this branch of the case:

1. The bill is not multifarious.

2 How. 642, Gaines v. Chew.
18 How. 261, Shields v. Thomas.
128 U. S. 410, Brown v. Guaranty Company.
86 Fed. Rep. 219, Fig Syrup Co. vs. Worden.
Daniels Chancery Practice, Vol. 1 (6th Ed.), 334.

2. There exists no adequate remedy at law.

6 Allen (Mass.), 56, Peabody v. Flint.
91 N. Y. 451, Barr v. Railroad Co.
10 Bush, 660, Jones v. Johnson.
18 How. 331, Dodge v. Woolsey.
104 U. S. 450, Hawes v. Oakland.
6 L. R. Eng. & Ir. App. Cases, 337, Peak v. Gurney.
2 Atk. 400, Charitable Corporation v. Sutton.

3. The matters complained of and set forth in the reformed bill of complaint are not *ultra vires*.

10 Wall. 604, Merchants' Nat'l Bank v. Nat'l Bank.
100 U. S. 699, Nat'l Bank v. Graham.
59 Fed. Rep. 338, Nevada Bank v. Portland Nat'l Bank.
69 Fed. Rep. 919, Varnish Co. v. Nat'l Bank.
77 Fed. Rep. 91, Nat'l Bank v. Wall Paper Co.
118 U. S. 256, Salt Lake v. Hollister.
122 U. S. 597, Ry. Co. v. Harris.
21 How. 209, Railroad Co. v. Quigley.

98 Fed. Rep. 562 (39 C. C. A. 1; 48 L. R. A. 210), Hindman v. First National Bank.
172 U. S. 534, Gas Light Co. v. Lansden.
139 U. S. 60, Central Transp. Co. v. Pullman Car Co.
171 U. S. 151, Pullman Car Co. v. Central Transp. Co.

I.

In Gaines v. Chew, supra, this court stated the rule as follows:

> "Whilst parties should not be subjected to expense and inconvenience in litigating matters in which they have no interest, multiplicity of suits should be avoided, by uniting in one bill all who have an interest in the principal matter in controversy, though the interest may have arisen on distinct contracts"; following and quoting from the opinion of Lord Cottenham, in Cambell v. Mackay, 1 Mylne & Craig, 603.

We have already quoted the rule as stated by this court in Shields v. Thomas, 18 How. 261.

All of the appellees have an interest in the subject claimed by their common title against the appellants, who are charged with having by fraudulent combination withdrawn and diverted that subject from its proper channels. The object of the bill is to reclaim and harvest the sums so fraudulently diverted, and to have the chancellor distribute the same amongst those entitled thereto, according to their several rights. We insist that the bill is not multifarious.

II.

Lord Hardwicke, in the great leading case of Charitable Corporation v. Sutton, supra, aptly said:

> "The courts of this kingdom are wisely formed of both courts of law and equity, and so are the tribunals of most other nations, and for this reason there can be no injury, but there must be a remedy, in all or some of them; and, therefore, I will never determine that frauds of this kind are out of the reach of courts of law or equity, for an intolerable grievance would follow from such a determination."

The right to maintain this action in the form in which it was instituted is purely equitable. The stockholders did not have the right to sue until they had first complied with the provisions of Rule 94, of this court, and the principles laid down in the case of Hawes v. Oakland, supra. And suing as they did, as the substitute for the injured corporation, they could only sue in equity, because their rights, in that respect, were equitable only. It does not matter if the action be founded upon a tort, as the shareholders had no right to sue except in equity.

It is a general rule that every actionable wrong gives to the persons injured a cause of action, and where this cause of action rests primarily in the injured corporation, which declines to sue, its stockholders, as the beneficiaries of the spoliated assets of the corporation, would have no right to sue, except in equity. They must either sue in equity, or they will be without remedy.

As between the corporation and its stockholders, the corporation is a trustee and its stockholders as cestuis que trust have a joint interest in all of its property and effects, which the courts will protect.

The objection that a court of equity has no power to furnish a remedy in a case of this character seems to us utterly untenable. We think the authorities above cited sustain our position.

III.

This court has decided, in the cases cited, supra, affecting national banks, as follows:

> "Corporations are liable for every wrong for which they are guilty, and, in such case, the *ultra vires* have no application. Corporations are liable for the acts of their servants, while engaged in the business of their employment, in the same manner and to the same extent that individuals are liable under like circumstances." (10 Wall. 604.)

Again this court said in National Bank v. Graham, supra:

> "An action may be maintained against a corporation for its malicious or negligent torts, however foreign they may be to the object of its creation, or beyond its granted powers. It may be sued for assault and battery, for fraud and deceit, for false imprisonment, for malicious prosecution, for nuisance and for libel."

And in the case of Railway Company v. Quigley, 21 How. 202 this court said:

> "The result of the cases is, that for acts done by the agents of a corporation, either in contractu or in delicto, in the course of its business and of their employment, the corporation is responsible, as an individual is responsible under similar circumstances."

And again, in Gas Light Company v. Lansden, 172 U. S. 534, this court said:

> "The result of the authorities is, as we think, that, in order to hold a corporation liable for the torts of any of its agents, the act in question must be performed in the course and within the scope of the

> agent's employment in the business of the principal. The corporation can be held responsible for acts which are not strictly within the corporate powers, but which were assumed to be performed for the corporation and by the corporate agents who were competent to employ the corporate powers actually exercised."

In this case the acts of the German National Bank, through its president and cashier, were within the scope of their employment, and for the benefit of the said German National Bank. We, therefore, respectfully submit that the said acts were not *ultra vires*. But even if this court should be of the opinion that they were, in a certain sense, *ultra vires*, still the principles laid down in the Palace Car Company cases apply, where the court said:

> "The courts have always striven to do justice between the parties, so far as could be done consistently with law, by permitting property or money parted with on the faith of an unlawful contract to be recovered back or compensation to be made for it."

It will be readily seen from the bill as amended that an accounting is sought between the complainants and the said conspirators to the end that, in any aspect of the case, they should be compelled to make restitution of the unlawful gains resulting from the said conspiracy.

Respectfully submitted,

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